United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7042

To be argued by
ALAN R. WENTZEL

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

TAXI WEEKLY, INC.,

Plaintiff-Appellee,

against

METROPOLITAN TAXICAB BOARD OF TRADE, INC., HOSYND PUBLICATIONS, INC., JACK PLOTSKY, ESTATE OF MORRIS HEIT, ESTATE OF GEORGE McINTYRE, ALFRED ZEFF, MORRIS LEFKOWITZ, MILTON MARKS, LEON MURSTEIN, GERALD NAREN, IRA SUCHMAN, LEONARD SCHAFFRAN, and BENJAMIN BOTWINICK,

Defendants-Appellants,

and

TAXICAB BUREAU, INC., EMPIRE TAXICAB COOPERATIVE, INC., INDEPENDENT TAXICAB OWNERS COOPERATIVE, UNITED TAXI OWNERS GUILD, INC., SALVATORE BARONE, ESTATE OF ALFRED J. MARKS and ESTATE OF NATHAN LEVINE,

Defendants.

BRIEF OF PLAINTIFF-APPELLEE

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BRIEF OF PLAINTIFF-APPELLEE

Statement of the Case

Plaintiff-appellee brought this antitrust action in 1966 to recover treble damages suffered when it was forced out of business by an alleged conspiracy among the defendants in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1, 2, and the New York Donnelly Act, Gen. Bus. Law § 340. Damages sought, before trebling, were $684,000. A jury trial was held before Hon. Thomas

P. Griesa in July 1975, at which time the jury rendered a verdict for plaintiff against the 13 appellants herein in the amount of $225,000, and in favor of four remaining defendants.

The Parties

Plaintiff, Taxi Weekly, Inc., was for many years the publisher of a weekly trade newspaper, *Taxi Weekly*, which served the New York City taxicab industry, and a monthly magazine, *Taxicab Industry/Auto Rental News*, which enjoyed a nationwide circulation (A 44-45).

Defendant Metropolitan Taxicab Board of Trade, Inc. ("MTBOT") was the principal trade association of the approximately 90 taxicab fleets in the industry during the years 1964-66 (A 45). These fleets, ranging in size up to several hundred cabs, owned approximately 6800 of the 11,708 taxicabs licensed in New York City (A 45). The balance were individually owned by owner-drivers (A 45).

Defendant Benjamin Botwinick was, at all relevant times, the Executive Director and accountant for MTBOT and the accountant for several of the defendant fleet owners (A 1453, 1456, 434, 471).

Defendants Jack Plotsky, Morris Heit*, Morris Lefkowitz, Milton Marks, Leon Murstein, Gerald Naren, Ira Suchman and Leonard Schaffran were principals of corporations which managed taxicab fleets in New York City. Each was a member of MTBOT during 1964, with Plotsky, Heit, Marks, Murstein, Naren and Suchman serving as officers or directors, or both, of the organization (A

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* Defendants Heit and McIntyre died during the pendency of this action, and their estates were duly substituted pursuant to Rule 25(a)(1), F.R. Civ. P.

1453, 1456). These defendants are sometimes referred to herein, along with other MTBOT members, as "fleet owners".

Defendant George McIntyre was, during the relevant period, the public relations representative of MTBOT (A 691). In late 1964, McIntyre, in secret partnership with defendant Alfred Zeff, a former *Taxi Weekly* associate editor, formed defendant Hosynd Publications, Inc., which began publishing a trade newspaper sponsored by MTBOT known as the *New York Hackman* (A 179, 702-05).

The complaint also named seven other defendants, of which three were dismissed during trial and four were exonerated by the jury. They are not parties to this appeal.

Facts Proven at Trial

In 1964 the New York City taxi industry was embroiled in a controversial attempt to secure a fair increase for the first time in more than ten years. While there was general agreement that an increase was appropriate, the amount and the character of the increase were hotly disputed. On behalf of the fleet owners, MTBOT urged adoption of a proposal in which the initial charge on the meter, known as the "drop charge", would be raised from 25 cents to 35 cents. The Wagner administration insisted that all of the drop charge increase should go to the taxi drivers and not to the owners. The fleet owners claimed they complied with this requirement by giving the drivers 5 cents directly and 5 cents in fringe benefits, but there was severe criticism of the plan by those who claimed that the fringe benefits were inadequately funded or would not be received by most drivers (A 111-15).

The owner-drivers, whose several trade associations together formed an umbrella organization called Independent Taxicab Owners Council ("ITOC"), at first sought a much larger increase than MTBOT, but eventually they joined forces with it and accepted the fare increase which passed the City Council in late 1964 substantially in the form proposed by MTBOT. In the first half of 1964, however, the taxicab industry was divided, and the proposed fare increase was stalemated before the City Council (A 108, 114-16).

In 1964, *Taxi Weekly* was the largest newspaper in the taxicab industry and was the only publication which enjoyed widespread readership throughout the entire New York taxicab industry (A 257, 819). *Taxi Weekly* was founded by Abraham Weisinger in the 1930's under the name *Taxi Age,* and, for many years prior to 1964, had been published under both names, with no difference in content (A 813, 819-20). *Taxi Weekly* had, during this period, reported the views of all segments of the industry (A 115-16), which frequently divided between the owner-drivers and the fleets, and it had opposed the fleet owners' position on important issues in the past (A 279-80). Contrary to the unproven assertions of defendants in this action, the newspaper had never been the "organ" of the fleet owners, who had their own public relations agent, McIntyre.

In 1958, Weisinger, who was then 66, sold half the business to Lester Peterman, under an agreement which required Peterman, who had joined the company two years earlier, to devote his full-time efforts to running the business while allowing Weisinger to enjoy semi-retirement at his winter home in Florida and his summer home in Montauk, New York (A 97, 286-87, 883-84).

The fiscal year which ended March 30, 1964, had been a banner year for Taxi Weekly, Inc. Advertising revenues,

the largest source of income, were at an all-time high of $64,069 for the newspaper alone, and a record $106,501 for *Taxi Weekly* and *Taxicab Industry/Auto Rental News* combined (A 1571-72). From total revenues of $151,000, the two owners, Peterman and Weisinger, divided profits of $57,089* (A 1572), only $15 short of its highest profits ever (A 1555). The quarter ending June 30, 1964 was equally promising (A 1476).

Throughout 1964, *Taxi Weekly* was active in reporting all views on the proposed fare increase and its lack of progress through the City Council (A 115-16). In its editorials, the newspaper solidly supported the fleet owners' proposal and urged its adoption (A 115, PX 1**). Although defendants' counsel claimed at trial and continue to assert on this appeal (App. Br. 4***) that the editorial policy and content of *Taxi Weekly* changed in early 1964, the evidence was to the contrary (A 116).† In addition

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* The corporation had elected the status of a small business corporation under Subchapter S of the Internal Revenue Code and therefore paid no federal income taxes (A 1571). Thus, its tax status was similar to that of a partnership (A 642).

** Exhibit references are to bulky documents, in this case the 1964 bound volume of *Taxi Weekly*, which are available to the Court in accordance with § 11(d) of the Court's rules.

*** "App. Br." refers to the brief of appellants other than Botwinick.

† The only record citations (A 107-10 and A 253) offered to support defendants' contention refer to events occurring *after* the conspiracy was formed and defendants had cancelled their subscriptions. Defendants also cite remarks by Judge Griesa outside the jury's presence as if this was proof that *Taxi Weekly* had alienated fleet owners (App. Br. 4, 30, 31). After all the evidence was in, however and no defendants had testified about any disagreement with *Taxi Weekly*, Judge Griesa recognized that, from the jury's perspective, no proof was ever offered to support defendants' view (A 1226-27).

to Peterman's testimony that there was no such change in policy (A 116), the best evidence was the newspaper itself which contained article after article throughout 1964 urging adoption of the MTBOT fare increase proposal. Indeed, during the first four months of 1964 *Taxi Weekly* carried 48 articles and editorials relating to the fare increase, not one of which opposed the MTBOT position (PX 1). While its news articles reported the reasons offered by City officials for the delay in passage of the bill, *Taxi Weekly's* editorials severely criticized the Council's inaction as being unjustified (PX 1, A 1069).

Nevertheless, perhaps in the spirit that led ancient rulers to slay messengers bearing bad tidings, the defendants suddenly turned on *Taxi Weekly*. In April 1964, Peterman was summoned to a meeting at the office of defendant Botwinick, who as Executive Director and chief spokesman for MTBOT, was leading the effort to secure the fare increase (A 103, 1429-30). Botwinick demanded that *Taxi Weekly* stop publishing positions taken by owner-driver groups and other interested parties and restrict itself solely to the fleet owner's viewpoint (A 110). He insisted that the newspaper should make "slashing attacks" on Morris Markin,* who was supporting owner-drivers in an effort to obtain a larger fare increase than that proposed by MTBOT (A 107-08). In short, Botwinick demanded unity in the industry on his own terms and wanted to silence the reporting of any contrary views (A 107). Finally, Botwinick volunteered that the "grapevine has it" that Peterman and Weisinger, the co-owners of Taxi Weekly, Inc. were having problems with each other (A 110, 1432-1)—something that Peterman was to-

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* Markin was the manufacturer of Checker taxicabs, the only purpose-built taxicab used in New York, and was a controversial figure in the industry, particularly among those who favored the use of stock-built automobiles as taxicabs (A 107, 418-19, 503).

tally unaware of (A 110). Peterman refused to accede to Botwinick's demands and the newspaper continued its complete coverage of the fare increase, while maintaining front-page editorial support for the MTBOT bill (A 116, PX 1).

Five weeks later, Peterman was met with a demand from Weisinger, who was then 72 years old and spending almost all his time in retirement, to sell his interest to Weisinger or dissolve the company (A 97, 116). A court proceeding was commenced which ended some months later when Peterman bought out Weisinger (A 118-19). At his deposition* Weisinger, who had alleged in his court petition that Peterman had become "*persona non grata*" with the fleet owners, admitted that the allegation was untrue (A 899) and that he could not recall ever being told by a fleet owner that *Taxi Weekly* was not accurately reflecting the fleet owners' position on the fare increase (A 893). Thus, the "dispute" with Weisinger was no dispute at all. It had no background and made no sense, except that Botwinick knew about it before it happened. The truth emerged two years later when defendant Murstein admitted to Peterman that he had known in 1964 that "something was being done" to pressure Peterman to sell out (A 159).

The matter finally erupted on July 13 and 14, 1964. On July 13th, a series of meetings among the industry leaders lasting far into the night was held. One meeting was held at Botwinick's office attended by owner-driver representatives and defendants Botwinick and McIntyre for MTBOT, along with Henry Friedlander, MTBOT's attorney (A 1430). Later, the owner-driver groups met with their executive boards (A 1431-32). At one such meeting, which lasted until 11:20 p.m., it was reported that be-

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* Weisinger died before trial (A 882).

cause of the fleet owners' intransigence, there was "another stalemate as far as the increase goes" (A 1432). While none of the defendants who attended these meetings came forward to testify at the trial, it is a fair inference, judging from the events that immediately followed, that a decision was made concerning *Taxi Weekly* at that time. The very next day, July 14, 1964, the top executives of MTBOT began cancelling their subscriptions of many years' standing to *Taxi Weekly* (A 1466).

When they acted, defendants left little doubt that they were working together, perhaps from the same room and telephone (A 122). First, defendant Heit telephoned his cancellation (A 122). A couple minutes later defendant Schaffran telephoned his cancellation (A 122). Before long, defendants Naren, Marks, Plotsky, and Murstein had also cancelled by telephone (A 122-23). Two other fleet owners, Philip Rosenblum and defendant Ira Suchman, wrote letters of cancellation on July 14 (A 124). Defendant Lefkowitz joined in the next day (A 1466).

Significantly, the initial rash of cancellations, five of which took place in the first half hour (A 122), did not come from rank and file members of MTBOT, as might have been expected if, as defendants claimed, there was widespread dissatisfaction with *Taxi Weekly*. Rather, the initial cancellations came from its top leadership (A 1456). Suchman was the president of MTBOT. Plotsky was vice-president and chairman of the executive committee. Rosenblum was secretary-treasurer. Heit was a vice-president. Plotsky, Rosenblum, Naren, Suchman, Murstein, Marks and Heit were all members of the MTBOT board of directors (A 1453).

The subscriptions which were cancelled were bulk subscriptions, with each fleet owner buying a sufficient number of copies to distribute to his many drivers (A 126). None of the initial cancellees had previously voiced any

complaint about *Taxi Weekly* (A 125); to the contrary, Plotsky and Murstein had recently sent in new lists of drivers whom they wanted to receive the paper (A 126). Indeed, Murstein had recently increased his subscription (A 126).

The July 14 cancellations reduced *Taxi Weekly's* circulation income by more than one-fifth (22.9%) (A 821) Within three days, 17 fleet owners (including defendant Lefkowitz who cancelled on July 15) cancelled, reducing *Taxi Weekly's* total circulation revenue by more than one-third (37.5%), and, in six days, by July 20, 1964, 22 subscribers of long standing, representing 42.9% of *Taxi Weekly's* circulation revenue had cancelled (A 821-23). Within six months, 65 subscribers, representing the great bulk of *Taxi Weekly's* circulation revenue, had cancelled their subscriptions (A 823-24).

At the trial, some of the defendants' depositions were read to the jury by plaintiff, and their explanations for the cancellations were rife with inconsistencies. For example, defendants Naren and Suchman each denied at his deposition that he had discussed his cancellation with defendant Plotsky or any other fleet owner (A491, 500), yet Plotsky admitted in his deposition that he had discussed the cancellations with Naren and Suchman, as well as Rosenblum (A 478-80), and Marks admitted he had discussed it "casually" with other fleet owners (A 453). While Murstein denied any discussion of the cancellation of subscriptions at formal meetings of MTBOT, he admitted that "unofficially between the meetings, or before or after the meetings, that was another story" (A 160).

None of the defendants came forward at trial to explain these inconsistencies or even to point out a single article in *Taxi Weekly* with which he had allegedly disagreed (A 438, 452, 477, 499, 509). Thus, the jury was left with the choice either of believing that the same

thought independently popped into the defendants' minds during the same half-hour of the same day or of believing that the defendants acted together in a conspiracy to boycott plaintiff. It was hardly surprising that the jury did not believe defendants' deposition denials, and that they concluded, as any reasonable man would, that a conspiracy occurred.

In September of 1964, during the height of the fleet owners' cancellations of subscriptions, Weisinger sold his one-half interest in the business to Peterman (A 128). By November, Zeff, who had left *Taxi Weekly's* employ on September 18, and George McIntyre, had formed Hosynd Publications, Inc. and had begun to publish the *New York Hackman,* a rival taxi industry journal which was bought by fleet owners for circulation among fleet drivers (A 141-42, 702). McIntyre, who was the public relations man for MTBOT, did not disclose his controlling ownership interest in the *Hackman* to its readers (A 705). The newspaper was sponsored by MTBOT (A 179). Zeff, concededly aware even before he resigned from Taxi Weekly, Inc. that he would be called on to start up another paper, attempted to prepare himself by stealing *Taxi Weekly's* subscriber list just before he left its employ (A 700). He asked the Circulation Clerk, Bea Krasner, to obtain the circulation list for him (A 700), but the scheme was foiled when Peterman caught her red-handed at the theft (A 143-44).*

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* Although counsel promised in his opening that Zeff would testify at trial (A 87), Zeff did not take the stand. His deposition testimony was read to the jury by plaintiff (A 700):

> "Q. At any time before that during the week had you asked Miss Krasner for the subscription list? A. Yes.

(Footnote continued on following page)

With the help of the fleet owners, Zeff and his publication met with some success (A 703, 706), although its circulation did not reach the owner-driver segment of the industry (A 685, 708). Nearly all of the *Hackman's* initial subscribers were *Taxi Weekly* cancellees who belonged to MTBOT (A 149). Some of the defendants later admitted to Peterman that they preferred *Taxi Weekly,* but they were unwilling to resume their subscriptions against the wishes of MTBOT (A 157, 160, 178).

While the cancellation of fleet owner subscriptions was a severe blow to plaintiff, it was not necessarily fatal, and the company was able to continue publication of *Taxi Weekly* and *Taxicab Industry/Auto Rental News* (A 261). Advertising revenues represented the largest source of *Taxi Weekly's* income (A 256), and most of that advertising was placed by manufacturers and dealers of taxicabs and automotive supplies who were primarily interested in reaching the individual owner-drivers with their advertising.* Since *Taxi Weekly* still retained its large circulation among owner-drivers (A 262), the newspaper remained an excellent advertising medium for these vendors.

(Footnote continued from preceding page)

"Q. Was that for the purpose of taking the list with you elsewhere? A. It was with the thought that if I may want to start a newspaper of my own, I may want to have a subscription list to circulate for subscribers to a new publication.

"Q. Had you asked Mr. Peterman's permission to obtain that list? A. No."

* Larger manufacturers, such as Chrysler, had fleet sales representatives who dealt directly with the 90-odd fleets to obtain sales (A 258, 332-36). As a practical matter, however, the nearly 5000 owner-drivers could only be reached through the medium of advertising (A 257).

When the cancellation of subscriptions by fleet owners failed to eliminate *Taxi Weekly,* defendants carried their efforts to destroy the business two steps further. First, starting in the Fall of 1964 they extended their own boycott of the newspaper by withholding news from it (A 184). Peterman identified several specific occasions of this at trial, including a refusal of defendant Botwinick to respond to a statement from Mayor Wagner concerning unionization (A 184), a refusal by an MTBOT attorney to give a statement about a controversy with the City's Human Rights Commission (although such a statement appeared in the competing *New York Hackman*) (A 185), a refusal by defendant Schaffran to explain his side of a union dispute at his garage (A 186), and the barring of *Taxi Weekly* from meetings of MTBOT (A 186).

Second, defendants struck at the heart of plaintiff's business by pressuring advertisers of taxicabs and equipment, who were defendants' suppliers, to join the boycott by withdrawing their advertising from *Taxi Weekly.* Here, the scheme took two forms: direct pressure on advertisers from their largest customers to remove their advertising from *Taxi Weekly,* and the circulation of false rumors designed to cause advertisers to withdraw. In each case, the conspiracy acted directly upon advertising placed and paid for from outside New York in interstate commerce.

Plaintiff subpoenaed to trial Glenn Moore, who was manager of the New York City branch of the Taximeter Division of Rockwell International (A 361). Rockwell was headquartered in Pittsburgh, Pennsylvania and its Taximeter Division was located in Hopewell New Jersey (A 361). For many years, Rockwell advertised its taximeters in *Taxi Weekly,* placing and paying for the advertising through an agency in Chicago, Illinois (A 1604, 1615). In early 1965, Rockwell cut back its advertising in *Taxi Weekly* and finally, in January 1966, eliminated all display advertisments (A 1492).

At a pretrial deposition, Moore had testified about a conversation with defendant Lefkowitz, his largest customer (A 379). At trial, he could no longer recall the conversation, and his deposition was read (A 376). Moore testified:

> "At that time, he [Lefkowitz] asked me why we were still—I am trying to remember the right word —why we were still advertising in *Taxi Weekly*. Didn't I know that that was no longer the fleet newspaper?" (A 367).
>
> * * *
>
> "Q. What was the pressure they were exerting on you? You tell me. A. They were saying that they—let me put it this way. They were saying that why was I, not I, but Rockwell, advertising in Taxi Weekly." (A 379-80*).

This thinly-veiled message was clearly understood by Moore, who passed the word on to his superior, Ralph Ulrich, division manager of Rockwell's Taximeter Division in Hopewell, New Jersey (A 907). Ulrich, in his deposition which was read at trial, confirmed that the pressure from the fleet owners which Moore reported to him was the reason why Rockwell stopped advertising in *Taxi Weekly*:

> "Q. What we are going into is what you said there was the fact, was it not, that the taxi fleet owners had been talking to Moore and Moore did talk to you about cutting down your ads in Taxi Weekly because the taxi fleet owners wanted you

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* The above-quoted answer is taken from the original deposition transcript as read to the jury. The answer at A 380 contains a typographical error by the court reporter at trial.

to; isn't that the fact? A. Must have, yes." (A 912).*

The foregoing testimony clearly established the defendants' successful efforts to coerce advertisers to withdraw from *Taxi Weekly*. They acted through defendant Lefkowitz, Rockwell's largest customer, who in turn had been one of the first to cancel his fleet's subscription to Taxi Weekly on July 15, 1964 (A 379, 1466). Significantly, this testimony remained completely uncontradicted at trial. Neither Lefkowitz nor any other fleet owner took the witness stand to deny or explain the damaging testimony of Moore and Ulrich. Lefkowitz's deposition was not read.

Another major advertiser which withdrew from *Taxi Weekly* in late 1965 was Chrysler Corporation (A 1492). Chrysler's advertising for Dodge taxicabs was placed from Detroit, Michigan by its advertising agency, Batten, Barton, Durstine & Osborne (A 760). At the beginning of October 1965, Chrysler had renewed its contract with *Taxi Weekly* calling for 13 advertisements over a one-year period (A 764). In late October, however, a representative of the advertising agency, Gil Pacewitz, telephoned Peterman to cancel the contract and to cancel the running of an ad which *Taxi Weekly* had not even yet received from Detroit (A 761-63). The reason Pacewitz

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* Both Moore and Ulrich initially failed to recall the conversations in question at their depositions, and it is these initial failures of recollection which are cited by defendants (App. Br. 7) to support their assertion that there was no evidence of pressure on advertisers. Each of the witnesses, however, had his recollection refreshed at his deposition by the playing of a tape recording of a contemporaneous conversation with Peterman during which the witness had described the pressures which had been applied. With their recollections thus refreshed, Moore related the conversation with defendant Lefkowitz quoted above and Ulrich confirmed that fleet owner pressures had caused Rockwell's cancellation of advertising in *Taxi Weekly*.

offered for the abrupt cancellation was that he had gotten information "from the field" in New York that *Taxi Weekly* was owned or controlled by Morris Markin, head of Checker Motors Corp., which, of course, was Chrysler's major competitor in the manufacture and sale of taxicabs (A 763). Markin, in addition to being controversial and generally disliked by many fleet owners and others in the industry (A 419, 503), had also sued Chrysler in 1964 for violations of the antitrust laws arising out of sales of taxicabs in New York.* It was understandable, therefore, that Chrysler would not want to do business with a newspaper rumored to be controlled by Markin. Accordingly, Chrysler cancelled its advertising in *Taxi Weekly* based on its information "from the field" despite Peterman's offer to prove, by affidavit, that the rumor was untrue (A 763).

Chrysler's man "in the field" at the time was its fleet sales representative, Frank Sailler (A 332). Sailler admitted that his fleet owner customers had registered "complaints in regard to our advertising and the paper" (A 344). He specifically identified defendants Naren and Murstein as telling him they were "unhappy" with *Taxi Weekly* (A 340, 345-46), and that Murstein and "other people" had told him that Checker was involved with *Taxi Weekly* (A 340, 342). While Sailler could not recall passing this rumor on to his superior, whom he saw in the office every week (A 337), it was undisputed that the rumor spread by Murstein and others found the mark in Detroit and resulted in Chrysler's cancellation of its advertising in *Taxi Weekly*. Murstein himself later admitted to Peterman that he was familiar with the rumor that Markin controlled *Taxi Weekly* (A 156).

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* See *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319 (2d Cir. 1969), *cert. denied*, 394 U.S. 999 (1969).

Because of Chrysler's premature cancellation of its advertising contract, it had to pay a higher rate for the one or two ads which had already appeared than the rate which would have applied if it fulfilled the contract (A 765). An even more striking example of an advertising cancellation which was adverse to the advertiser's economic interest occurred in the case of Future Motors, a Dodge dealer which was *Taxi Weekly's* largest advertiser. By December 1964, Future Motors had almost completed a full year of weekly ads for which it was being billed at a 52-time rate (A 765). In December 1964, Future Motors suddenly cancelled its advertising. Peterman testified (A 765):

> "I told Harold Peterfreund, the head of Future Motors, that by canceling I would have to charge him the 26-time rate, which would increase the cost of the ads he had run, the 50 or so ads that he had run so far, sufficiently that it would cost him less to run the additional ad or two and he would get in effect free ads by continuing to run. He refused."

Another major advertiser, Ebbetts Field Dodge, in which Chrysler held an ownership interest (A 392), cancelled soon after Future Motors (A 1492), despite the fact that most of its sales of taxicabs were to owner-drivers (A 388) whom *Taxi Weekly's* advertising was still reaching.

Thus, *Taxi Weekly's* advertisers cancelled under circumstances adverse to their own economic interest, not only in no longer reaching the owner-driver audience but also in increasing their own advertising costs. These facts, coupled with the direct, uncontradicted proof of coercion by the defendants, amply supported the jury's verdict that the defendants unlawfully conspired to destroy plaintiff's business.

With the continued erosion of circulation and advertising income (A 1598), Taxi Weekly, Inc. incurred a substantial loss in the fiscal year ended March 31, 1966 (A 1587) and went out of business in September 1966 (A 201). Upon the demise of *Taxi Weekly,* plaintiff was also forced to discontinue publication of the magazine *Taxicab Industry/Auto Rental News.* The two publications had shared personnel, office space, addressograph equipment, telephone, services and, to a large extent, editorial material and advertising contacts (A 199-200). When the newspaper ceased publication, the magazine could not support the overhead and other expense by itself, and it, too, was forced to terminate (A 201-02).

At the trial, each side offered evidence on damages through the use of expert testimony. The hypotheses used by the two experts were in considerable conflict, however, resulting in widely disparate valuations and squarely presenting an issue for the jury to determine.

Plaintiff's witness, James B. Kobak, had been engaged in the valuation of publishing companies for nearly 30 years (A 514-15). An accountant by profession, during the last 15 years he had formally valued over 160 publications for the purpose of determining a sales price (A 517), including both well-known publications such as *Saturday Review, Harper's, Variety* and *Golf Digest* as well as many smaller newspapers and trade publications (A 517-18). His work with the publishing industry also included cost analyses and surveys of salary levels for the members of industry-wide associations (A 520).

As a means of determining what a buyer would pay for the business, Kobak presented a valuation based on the going concern value of Taxi Weekly, Inc. (A 525), as of July 1, 1964 (A 531). As a starting point, he examined

the prices of publicly-traded securities in the publishing field to determine what value the general public, representing willing buyers and sellers in the open market, was placing on securities of publishing companies. Publicly-traded publishing companies were divided into companies which were primarily magazine publishers and those which were primarily book and other types of publishers (A 533-1). On June 30, 1964 the magazine group had an average price/earnings ratio above 16 times earnings, while the book publishing group was near 20 times earnings (A 533-2). It is important to note here that Kobak was using averages as a reference point, with no suggestion that the selling price of any one company should govern the value of Taxi Weekly, Inc. (A 533-2), and that these averages were used only as a starting point in the valuation process, which then included specific analysis of the particular company involved, its history, its financial position, its strengths and weaknesses, its profitability, its competition, the quality of its management and its growth potential, in order to arrive at an appropriate multiple of earnings (A 529).

The first step was to determine the average earnings of the company in recent years (A 529-30). Taxi Weekly, Inc., as a small business corporation within the meaning of Subchapter S of the Internal Revenue Code, had elected not to be taxed under the Code (A 193, 1571). Since Subchapter S requires the shareholders to pay personal income tax on all net income, whether distributed to them as salaries or dividends or not, it is common practice for the owners of a Subchapter S corporation to take virtually all the profits out of the business each year (A 538). For purposes of valuation, the task is to analyze the profits, regardless of how they are distributed or labelled, and to determine what portion is fairly attributable

to the labor of the owners and what portion is earnings of the company.*

In Kobak's opinion, based on his knowledge of the publishing industry, a publisher could have been hired to run Taxi Weekly, Inc. in 1964 for $15,000** (A 539). He verified this opinion through industry-wide surveys of salaries made at the time, which revealed that salary levels correlated to the size of the publication and that, for successful publications comparable in size to plaintiff, publishers' salaries were about at the $15,000 level (A 539, 546). Peterman's own annual salary of $6,000, when he was performing the functions of publisher and editor before becoming an owner in 1958, was further corroboration of the reasonableness of Kobak's opinion (A 766).

After reducing the profits recorded on Taxi Weekly, Inc.'s financial statements by the $15,000 provision for normal officer's salaries, Kobak next reduced the profits by a provision for state and federal income taxes (A 548, 1490). This calculation was an extremely conservative measure since the company when owned by Peterman and Weisinger was not required to pay federal corporate income taxes, nor would such taxes have been paid by any other buyer or group of buyers who qualified for treatment as a small business corporation under Subchapter S. By applying such a provision for taxes, the earnings were reduced to a figure considerably below that which the

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* As noted in Point III, *infra*, defendants' discussion of damages completely ignores the fact that plaintiff, under Subchapter S, paid no corporate income taxes, thus rendering labels of salaries, dividends or bonuses meaningless since the deductibility of these items has no application.

** This sum is equivalent to more than $26,000 in today's inflated dollars.

owners of the company were actually receiving from the business. This factor was recognized by Judge Griesa when he ruled there was "ample justification" for the jury's verdict (A 1219-24, 1237).

By reducing the owners' take-home profits, which averaged more than $52,000 per year (A 1490), by provisions for salaries and taxes, Kobak reached a three-year net earnings average of $24,823 (A 1491). While defendants now argue that Kobak ignored any provision for return on capital (App. Br. 44), they completely agreed with Kobak during trial that return on capital was a meaningless concept in a publishing business of this type because almost no capital assets were required to start and run the business (A 580, 596-97). Under examination first by the Court and then by defendants' chief trial counsel, Kobak testified (A 596-97):

> "Q. [The Court] Now can you approach it from another side and find out what is a normal return on capital, or is that meaningless? A. In the publishing business, of course, capital is not employed to a great exent so this is not a term that is used. It is meaningless because the return on capital is enormous if you stop to think about it because there is really no capital in the business.
>
> * * *
>
> "Q. [Mr. Nessen] Return of capital is a meaningless word, isn't it, in the publishing field? A. It's very seldom used because capital is so unimportant practically speaking."

After reaching the three-year earnings average of $24,823, Kobak then applied an earnings multiple of ten to reach his going concern value of $248,230 (A 549). In arriving at a multiple considerably below the industry average of 16, Kobak took into consideration the lack of

growth in the taxi industry, the small size of the company and the fact that it was not publicly held, as factors operating to reduce the multiple (A 550). He was closely examined on each of these factors, and the weight to be given his testimony and the conflicting opinion of defendants' expert was squarely and properly presented to the jury to decide (A 1142-46).

Kobak next offered a calculation of damages on a lost profits theory (A 554). Because the size of the industry had remained constant from 1964 until trial, the problems in the industry had remained essentially the same, and there was still a need for communication and a need for advertisers to try to sell their wares, it was Kobak's opinion that *Taxi Weekly,* which had already been in business for more than 30 years and was then in the hands of young, yet experienced, management, should have been able to "continue virtually in the same way they had been with only cost and income increases based on inflation" (A 555). From available statistics showing increases in advertising rates, circulation revenues, and costs of paper, printing, postage, salaries and other items, Kobak was able to calculate the profits lost by plaintiff for each of the eleven years from 1965 to 1975. The lost profits totalled $647,296 (Supplemental Record on Appeal, PX 109).*

The lost profits theory of damages was excluded by Judge Griesa as being speculative because of his belief at that time that defendants would prove the existence of a dispute between Peterman and the entire fleet owner segment of the industry, which, if it were true, would have caused Kobak "to at least inquire about it" before estimating future profitability (A 728). Of course, as it

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* References to the Record on Appeal refer to papers not printed in the Joint Appendix.

turned out, defendants never did prove the existence of such a dispute, as Judge Griesa correctly realized following the jury's verdict (A 1224, 1226-27). In his opinion denying defendants' post-trial motions, Judge Griesa said (A 1236-37):

> "There are a few salient points that come to mind in drawing my conclusion. The defense—or let me put it this way: Not one of the defendants ever testified as to this alleged dispute which existed between Mr. Peterman and the taxi fleet owners prior to the time of the alleged conspiracy.
>
> "No issue of the newspaper or any other really solid fact was adduced to show the nature or cause of such a dispute.
>
> "There was conclusory testimony of such a dispute in the depositions of various defendants, but such testimony was a long way from really explaining the point.
>
> "The jury was entitled to reject that deposition testimony, particularly when none of the deponents, even though many of them are still alive and able to testify, even when none of these people came on to the witness stand, although some of the people were sitting in the back of the court at times.
>
> "In my view the failure of these defendants or any of them to testify was something which the jury was entitled to give great weight to on both liability and damages.
>
> "In other words, what we have here are two strenuously argued and effectively argued sides of a case. The jury chose the plaintiff's side here and there was ample justification for doing so."

Thus, the jury's verdict of $225,000 was well supported by the evidence before it and was far below the amount which plaintiff's alternative theory of damages would have established.

Defendants' expert on damages was Joel W. Harnett, who was the head of a company which published trade journals and newsletters (A 926). In previous years, he had been in charge of marketing for Cowles Communications, during which time he participated in discussions of purchases and sales of publications (A 930). Harnett made no financial analysis of those publications (A 982),* had no training in accounting (A 983), was not aware that Taxi Weekly, Inc. had a tax status like that of a partnership (A 991), and admitted he did not know how to value a partnership (A 991), or even, for that matter, a corporation (A 1004).

Harnett valued Taxi Weekly, Inc. at "a little less than book value," or approximately $12,000 (A 945, 1145). Further, when he assumed various hypotheticals, he concluded that the publication had "a negative value" (A 998). Little analysis was offered to support this astonishing opinion. The only influencing factors mentioned by Harnett were a dip in circulation income (A 941), a "flat line" in advertising income** (A 941), a "low" net profit (A 942), and a type of circulation (through fleet owners) which,

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* In fact, Cowles hired Kobak to make such evaluations (Record on Appeal, Item No. 86; A 1097).

** Harnett was not aware that the percentage increase of *Taxi Weekly's* advertising income from 1960-64 was greater than the publishing industry average (A 989; *compare* A 638-39). In fact, he suggested that *Taxi Weekly* had a poorer record than "the publishing industry generally" (A 989), but then admitted he did not look at the statistics and made no calculation at all to compare *Taxi Weekly* with the rest of the industry (A 989).

though "not unusual in a trade paper", was "fragile" (A 944). Harnett made no effort to square his $12,000 value with the company's 33 years of successful operations or with the fact that the business had yielded $57,000 to its owners in 1964, a fact which prompted Judge Griesa to remark about Harnett after the verdict (A 1224):

> "Well, he had his reasons and the jury might have accepted that, but if I were the owner of that, I will tell you right now, I wouldn't take [$12,000]. I would say, look, in one year I can earn five times that."

The fact is that Harnett, because he was unfamiliar with Taxi Weekly, Inc.'s Subchapter S tax status (A 991), made no effort to determine what portion of the amount taken out of the business each year by the owners represented a fair payment for services and what part represented the profits of the business (compare A 595-97). Instead, he apparently looked only at the few hundred dollars left after the owners distributed the profits each year and mistakenly thought that amount was the profit (A 942). Moreover, he admitted that he studied only half the business, giving little attention to the operations of *Taxicab Industry/Auto Rental News* (A 943, 996).

Harnett's further opinion that Taxi Weekly, Inc. had a negative value as of June 1964 was based on the assumption that *Taxi Weekly's* circulation figures were somehow fraudulent (A 937, 998), an allegation which was argued to the jury, but never proven. For many years, approximately half the copies of *Taxi Weekly* continued to be issued under the masthead of its original name, *Taxi Age* (A 839). Aside from the title, it was one newspaper, completely identical in all respects (A 813). With permission of the Post Office, *Taxi Weekly* copies were mailed second-class, while *Taxi Age* copies went

third class (A 848, 855). What excited the defendants was that in October 1965, more than a year *after* the conspiracy had virtually wiped out the paper's circulation income, Peterman submitted a statement of ownership required by the second-class mail regulations which incorrectly overstated the paid portion of the circulation. Peterman openly admitted this at the trial (A 868), pointing out that it was done in an effort to save his business (A 880). He also testified, without contradiction, that the statements of ownership in prior years, before defendants and other MTBOT members cancelled their paid subscriptions, were truthful and accurate.* Thus, there was no basis for Harnett's supposed concern for *Taxi Weekly's* circulation figures back in June 1964, the time at which he was valuing the company. In any event, the *Taxi Age* arguments were fully presented to the jury, which saw fit to decide in plaintiff's favor.

In view of the proof that defendants had consciously gone far beyond an agreement to cancel their own subscriptions and had attempted to coerce advertisers and sources of news into joining their group boycott so as to destroy plaintiff's business, plaintiff requested that the jury be instructed that such facts, if found, would constitute a *per se* violation of the antitrust laws, thus permitting no attempts at justification of defendants' acts (A 1151). The court, however, refused to give the *per se* instruction (A1238-39). In the event, this ruling, although favorable to defendants at the time, made little difference since the defendants did not call a single fact witness.

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* The statement made by defendants that plaintiff "secured this preferential rate by filing false affidavits" (App. Br. 3) is thus belied by the record. The uncontradicted testimony is that the 1964 statement of ownership was accurate and that only the one statement, filed in 1965 long after the conspiracy struck, was incorrect (A 868).

No defendant took the witness stand, although several had been in court during the trial, to explain his reasons for cancelling *Taxi Weekly*, to point out any dispute or disagreement with the paper or its policies which might have affected the value of the company, or to explain or even simply deny to the court and jury the otherwise uncontradicted proof that advertisers had been coerced. As a result, the jury was instructed, with no exception taken, that it could infer that such testimony, if given, would have been unfavorable to the defendants (A 1107). Despite defendants' utter failure to offer proof on their theories, the jury was carefully instructed on each of defendants' contentions (A 1131) and the proof on all sides was accurately summarized by the court.

Preliminary Jurisdictional Point

The appeal of all defendant-appellants except Botwinick was untimely.

Prior to the entry of judgment, defendant Botwinick, on January 5, 1976, moved for judgment n.o.v. or, in the alternative, for a new trial, pursuant to F.R. Civ. P. Rules 50 and 59 (A 1274). Before the motion was decided, judgment was entered on January 19, 1976, from which all defendant-appellants, except Botwinick, purported to appeal on January 29, 1976 (A 1635).*

Pursuant to Appellate Rule 4(a), F. R. App. P., the January 29, 1976 notice of appeal was untimely and invalid. Rule 4(a) provides, in relevant part:

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* An amended judgment was entered on February 2, 1976 (A 1633), but appellants other than Botwinick filed no further notice of appeal.

> "The running of the time for filing a notice of appeal is terminated *as to all parties* by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket." (Emphasis added.)

The Botwinick motion was denied on April 2, 1976 (Botwinick Appendix 1a-2a), which commenced the running of the full time for appeal by all parties on that date. By the expiration of the 30-day period on May 3, 1976, however, only Botwinick had filed a proper notice of appeal, despite the fact that Botwinick's brief, served on April 19, 1976, made specific mention of the provisions of Rule 4 governing the time to appeal and put the remaining defendants on notice (Botwinick Br. 2).

In view of the failure of those defendants to file a timely notice of appeal, their appeal is subject to dismissal. However, since the Court must consider the merits in any event, and recognizing the preference of other circuits to construe Rule 4(a) liberally, plaintiff has not filed a separate motion to dismiss.

POINT I

The court below properly found subject matter jurisdiction.

A. The District Court's rulings on subject matter jurisdiction.

Defendants made repeated attempts in the court below to secure a dismissal or limitation of damages* on the ground that there was an insufficient nexus with interstate commerce to sustain jurisdiction under the Sherman Act. The first attempt was a motion to dismiss the complaint (Record on Appeal, Item No. 7). On December 15, 1970 the District Court (Judge Croake) denied that motion, finding that the requisite effect upon interstate commerce necessary to sustain the jurisdiction of the court existed (A 30). In its opinion, the court stated (A 31-32):

> ". . . between 100 and 200 copies [of *Taxi Weekly*] were distributed throughout the United States on a weekly basis and much of its advertising revenue came from national corporations. In addition, articles on the taxi industry outside of New York were sometimes carried.
>
> ". . . Accordingly, this Court finds that the above-mentioned facts, which are not in dispute, are enough to sustain a finding of 'interstate commerce' within the meaning of § 1 of the Sherman Act.

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* Although defendants seek a complete dismissal in their jurisdictional argument, the jury found defendants guilty of violating both the Sherman Act and the New York Donnelly Act (A 1113). Accordingly, even if defendants were successful in their Sherman Act jurisdiction argument, the action should not be dismissed, although the trebling of damages and attorney's fee award would be eliminated, lowering the judgment to $225,000 plus costs.

> *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469 (1940), *United States* v. *Employing Plasterers Association of Chicago,* 347 U.S. 186 (1954)."

This determination, it should be noted, did not simply defer the issue of interstate commerce jurisdiction until trial, but found the requisite factual basis for jurisdiction.

At the trial, Judge Griesa, having heard some of the evidence and having observed that the facts relating to interstate commerce were essentially undisputed and could be stipulated by the parties, found that there was a sufficient basis for jurisdiction as a matter of law (A 753-57, 1402-04). Although defendants mildly complain about the court's procedure in postponing the formal introduction of remaining evidence and stipulations into the record, several observations about that procedure are appropriate. First, it must be recognized that the court itself may properly determine jurisdictional facts. In *Sinclair* v. *Spatocco,* 452 F.2d 1213 (9th Cir. 1971), it was stated:

> "Nor was it error to refuse to defer determination [of appellant's citizenship so as to decide whether diversity of citizenship jurisdiction existed] until the issue could be submitted to a jury. The trial court has discretion to determine the jurisdictional facts itself." (Citations omitted.)

In *Marra* v. *Bushee,* 447 F.2d 1282 (2d Cir. 1971), this Court distinguished the determination of a factual issue relating to choice of law from "a jurisdictional consideration within the fact-finding province of the trial court." 447 F.2d at 1284. Thus, *Marra,* although relied upon by defendants, actually indicates that the trial court had the fact-finding power with regard to jurisdictional facts. See also *Gilbert* v. *David,* 235 U.S. 561 (1915); *Rosemound*

Sand & Gravel Co. v. *Lambert Sand & Gravel Co.*, 469 F.2d 416 (5th Cir. 1972); *Sapp* v. *Jacobs*, 1976-1 Trade Cases ¶ 60,768 (S.D.Ill. 1976); and *Chance* v. *E.I. Du Pont De Nemours & Co., Inc.*, 57 F.R.D. 165, 169 (E.D.N.Y. 1972).

Second, defendants themselves had urged the lower court to determine the interstate commerce issue in a separate hearing outside the jury both at a pre-trial conference (Record on Appeal, Item No. 18) and in their trial brief (Record on Appeal, Item No. 32), thus, in effect, consenting to submission of the matter to the court as a matter of law. See *Page* v. *Work*, 290 F.2d 323, 325-26 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961).

Finally, despite having nearly six months before the record was completed to develop any additional evidence in their favor, and despite being urged by the court to submit any such proof (A 1173), defendants never did submit any evidence on interstate commerce and were unable to point to a single issue of fact relating to the question. As Judge Griesa was able to observe at the close of the proceedings, "the basis for that ruling is either stipulated or otherwise without any contest whatever" (A 1425).

Thus, there can be no claim that the defendants were prejudiced in any way by the nature of the lower court's procedure. The sole question, therefore, is whether there was sufficient evidence in the record to support the lower court's ruling. As the record makes clear, that ruling was amply supported by the evidence on any one of several theories.

B. The jurisdictional standards of the Sherman Act.

The jurisdictional reach of Section 1 of the Sherman Act is co-extensive with the power of Congress to regulate

under the Commerce Clause.* *United States* v. *Southeastern Underwriters Ass'n*, 322 U.S. 533 (1944). In *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945), the Supreme Court reaffirmed the rule:

> "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; 'exercised all the power it possessed.' Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 [1940]."

An antitrust plaintiff may establish the necessary connection with interstate commerce in either of two ways: by demonstrating that the alleged anticompetitive conduct occurred in interstate commerce, or by showing that the conduct, though wholly intrastate, had a substantial effect on interstate commerce. See, *e.g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948); *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F.2d 732 (9th Cir. 1954), *cert. den.*, 348 U.S. 817 (1954).

Defendants here deal only with the second of these tests, taking the position that there was no evidence that their conduct operated directly on interstate commerce (App. Br. 15). This position ignores, however, the direct,

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* While it is not necessary to belabor the matter in view of the unequivocal language of the Supreme Court, it should be noted that the recent decisions in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 194 (1974), and *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975), concern the Robinson-Patman and Clayton Acts, not the Sherman Act. The determination of jurisdiction under those statutes has, traditionally, involved quite different considerations than under the Sherman Act. In fact, in *Copp Paving*, the Supreme Court expressly stated that its decision did not apply to the Sherman Act, which statute has a much broader jurisdictional reach. 419 U.S. at 194. Thus the question of statutory construction, crucial to the resolution of those cases, is not present here.

uncontradicted evidence of coercion on plaintiff's interstate advertisers. Thus, the proof in the court below satisfied the requirements of both standards of jurisdiction. In view of defendants' focus on the "substantial effect" test, that standard will be dealt with first.

1. Defendants' conduct substantially affected interstate commerce.

Under the "affecting commerce" test, the conduct complained of, even if it occurred wholly on the state or local level, may be within the purview of the Sherman Act if the conduct substantially affects interstate commerce. *United States* v. *Employing Plasterers Ass'n,* 347 U.S. 186, 189 (1954); *United States* v. *Women's Sportswear Mfrs. Ass'n,* 336 U.S. 460, 464 (1949). In fact, the business under attack would not, in any way, have to be engaged in interstate commerce for federal jurisdiction to exist, for the only necessary determination is whether interstate commerce is in any substantial way affected by the conduct. *United States* v. *Wrightwood Dairy,* 315 U.S. 110 (1942).

It is not necessary to reach that point in this case, however. Following the Supreme Court's decision in *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951), it is impossible to say that Taxi Weekly, Inc. was not engaged in interstate commerce. In *Lorain Journal,* the Supreme Court analyzed the activities of a local newspaper and radio station. After noting that only 165 copies of the newspaper's circulation were sent out of Ohio, the Court observed that the newspaper published substantial quantities of state, national and international news, that it carried a substantial quantity of national advertising, and that shipments and payments incidental to those matters and to the purchase of paper and ink involved many

transactions in interstate or foreign commerce. 342 U.S. at 146-47. The Court similarly analyzed the activities of the radio station, with particular emphasis on the interstate flow of news and advertising.

After these analyses, the Court stated:

> "There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce. *Associated Press* v. *United States*, 326 U.S. 1, 14; *Associated Press* v. *Labor Board*, 301 U.S. 103. The same is true of national advertising originating throughout the nation and offering products for sale on a national scale. The local dissemination of such news and advertising requires continuous interstate transmission of materials and payments, to say nothing of the interstate commerce involved in the sale and delivery of products sold." 342 U.S. at 151.

A similar view, relying upon the interstate flow of news and advertising, was stated in *Evening News Pub. Co.* v. *Allied Newspaper Car. of N. J.*, 263 F.2d 715, 717 (3rd Cir. 1959):

> "Intrastate advertising is necessary to the economic life of the paper and necessary to its readers. Interstate advertising affects the paper and its readers to a lesser degree but affect them it does appreciably. To place that news and advertising in the hands of New Jersey people requires, as the United States Supreme Court said in Lorain Journal v. United States, 1951, 342 U.S. 143, 151, 72 S. Ct. 181, 185, 96 L. Ed. 162 '* * * continuous interstate transmission of materials and payments to say nothing of the interstate commerce involved

> in the sale and delivery of product sold'. The end result, the distribution of the News, as a complete newspaper containing those news items and advertisements, to its reading public in Newark or any other New Jersey area is, as the Court held in Lorain (342 U.S. at page 152, 72 S. Ct. at page 185), '* * * an inseparable part of the flow of the interstate commerce involved.'"

See also *Greenspun* v. *McCarran*, 105 F. Supp. 662 (D.C. Nev. 1952), and *Hearst Publications* v. *NLRB*, 136 F.2d 608, 610 (9th Cir. 1943), *rev'd on other grounds*, 322 U.S. 11 (1944).

The facts concerning interstate advertising in *Taxi Weekly* are, in large part, stipulated (A 1615-25) and are not otherwise contested. It was stipulated that plaintiff received $8,804.39 in its 1964 fiscal year from *Taxi Weekly* advertisers or advertising agencies located outside New York (A 1615-17).* It was further stipulated that revenue from advertisements of taxicabs and automotive parts in *Taxi Weekly* totalled $21,627.21 in 1964 (A 1619-20), of which all but $1,967.28 was paid for advertising of products made or assembled outside New York (A 1619-20). The entire amount directly related to enormous sales of products in interstate commerce, namely automobiles and parts for the New York City taxicab industry. It was stipulated that 6,296 taxicabs were sold in New York City in the calendar year 1964 (A 1620). The advertisers involved were the automobile manufacturers and

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* Defendants use the figure $6,424.71 (App. Br. 19), which does not appear in the stipulation, apparently by treating as "local" advertisements those placed by such companies as Chrysler Corp., whose Detroit advertising agency placed the ads and transmitted copy in interstate commerce from Michigan but preferred to be billed at a central location in New York (A 1616).

dealerships who sold practically all of the new taxicabs in New York City during 1964 (A 1342). Using a conservative cost of $2,000 per cab (A 1419), the record demonstrates that *Taxi Weekly* advertising played an integral part in interstate sales of products valued at more than $12.5 million.

The relevance of interstate sales of products advertised in *Taxi Weekly* was confirmed by the Supreme Court in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). In *Goldfarb*, the challenged conduct involved the establishment of minimum fee schedules for intrastate legal services performed in real estate transactions. Viewing interstate commerce "in a practical sense", the Court found that title searches frequently formed an integral part of interstate realty purchases. The Court stated:

> "Thus in this class action the transactions which create the need for the particular legal services in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower. In financing realty purchases lenders require, 'as a condition of making the loan, that the title to the property involved be examined. . . .' Thus a title examination is an integral part of an interstate transaction and this Court has long held that
>
> > 'there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.'

United States v. Frankfort Distilleries, 324 U.S. 293, 297 (1945)." 421 U.S. at 783-84.

The same reasoning applies to the present case. It cannot be denied that in today's economy, advertising is "in a practical sense" an integral part of the sale of goods and services in interstate commerce. When practically all the sellers of taxicabs advertise their product in the one newspaper which reaches the bulk of their potential customers, that advertising has a direct, integral connection with the sales of that product. This is the teaching of *Goldfarb* and *Lorain Journal*.

Defendants make no mention of *Goldfarb*, and their attempt to distinguish *Lorain Journal* does no more than highlight the obvious relevance of that decision when, after two pages of discussion, they concede that "the result in *Lorain Journal* logically implies jurisdictional consequences" (App. Br. 22). When defendants go on to urge that *Lorain Journal* does not hold that interstate sales of products advertised in a local newspaper should be considered in determining jurisdiction when the newspaper has been the target of a local conspiracy, they fail to take into account the holding of *Goldfarb* that interstate commerce must be viewed in a practical sense and that local activity which forms an integral part of interstate transactions is itself part of interstate commerce. Thus, as *Lorain Journal* suggests, and *Goldfarb* confirms, interstate commerce is substantially affected by a conspiracy which restrains the local dissemination of advertising of millions of dollars worth of products sold interstate.

Defendants' argument that "there was no evidence as to any decline in interstate automobile sales" (App. Br. 24) was specifically rejected by the Court in *Goldfarb*.

There a similar argument was made that there was no evidence of any decline in interstate home purchases. The Court said:

> "The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved." 421 U.S. at 785.

Out-of-state advertisers and advertisements of products and services sold in interstate commerce accounted for 76.3 percent of *Taxi Weekly's* advertising revenues in 1964 (A 1615-25). When coupled with the completely interstate advertising revenues of *Taxicab Industry/Auto Rental News*, the record shows that nearly $100,000 per year of advertising revenues derived through interstate commerce was lost to plaintiff as a direct result of defendants' conduct (A 1573).

While the interstate advertising portion of plaintiff's business undoubtedly establishes a substantial effect on interstate commerce, other substantial interstate aspects of plaintiff's business must also be considered in determining the total impact of defendants' unlawful conduct.

The uncontradicted evidence at trial revealed that *Taxi Weekly* obtained a substantial portion of news through interstate clipping services (A 101, 1168-69, 1339). These clipping services were located outside of New York and transmitted the materials purchased by plaintiff into New York (A 1169). The sources of the news items sold to plaintiff were published outside of New York (A 1169). In large part, the news which was the subject of the clippings sold to plaintiff concerned taxi industry news outside New York. *Taxi Weekly* also obtained news from

periodicals published by taxicab fleets throughout the United States (A 101).

The interstate flow of news was not limited to news that initially appeared elsewhere and was reprinted in *Taxi Weekly*. News items initially appearing in *Taxi Weekly* were, in many instances, reprinted in periodicals in other states (A 1172). The weekly comparison of the total number of each automobile manufacturer's sales to the New York City taxicab industry, a regular feature of *Taxi Weekly*, was nationally disseminated in *Automotive News*, published in Detroit, and *Taxicab Industry/Auto Rental News* (A 1173, 1433-46). Other news items, initially appearing in *Taxi Weekly*, also were reprinted by publications in a number of other states and England (A 1173, 1447-49).

Between 100 and 200 copies of *Taxi Weekly* were mailed each week to readers throughout the United States and foreign countries (A 1338). Many of these out-of-state readers supplied automobiles, parts, taxicab equipment, and other supplies to the New York taxicab market, while other readers desired to keep abreast of New York City taxicab industry (A 1176).

The operations of Taxi Weekly, Inc.'s monthly magazine, *Taxicab Industry/Auto Rental News*, were also in interstate commerce. *Taxicab Industry/Auto Rental News* was a national magazine. It was printed in Hanover, New Hampshire and circulated all over the United States, with 90 percent of its circulation outside New York (A 1180). Its advertising was placed by national advertisers from all parts of the country. For example, the June 1964 issue contained full page ads from the following companies: Rockwell Mfg. Co., Hopewell, N.J.; Chrysler Motors Corp., Detroit, Mich.; Chevrolet Division of General Motors, Detroit, Mich.; Morgan Smith Automotive Products, Inc., Philadelphia, Pa.; Best Taxicab Buys, Inc., Hoboken,

N.J.; American Fleet Car Corp., North Bergen, N.J.; Checker Motors Corp., Kalamazoo, Mich.; Future Cars Corp., Jersey City, N.J.; and Wm. E. Whaley Co., Louisville, Ky. (PX 7). The news stories were likewise national in scope and coverage (PX 7). The advertising revenues received from this exclusively interstate advertising were substantial:

1961	$45,018	(A 1555)
1962	$45,190	(A 1555)
1963	$43,515	(A 1572)
1964	$42,432	(A 1572)

Printing and paper purchases, all made outside New York (A 1180), exceeded $15,000 per year (A 1571-72).

The magazine was directly affected by defendants' conspiracy in that plaintiff was unable to continue its publication after *Taxi Weekly* was finally forced out of business in 1966 (A 201). When both publications were issued, the same personnel, office, equipment and services were used, thus allowing plaintiff to share expenses between the two publications and enabling each to contribute to profit (A 199-200). Though Peterman gave some thought to continuing with the magazine, he was unable to do so because expenses could not be reduced sufficiently to offset revenues lost from *Taxi Weekly* (A 201-02). Defendants made no claim that the magazine would have been self-sufficient.

Defendants completely ignore the substantial impact on interstate commerce of the demise of *Taxicab Industry/Auto Rental News*. Yet it cannot be denied that the trade of this competing magazine in the transportation industry across the nation was restrained by defendants' acts. Readers throughout the country no longer had the

news and product information which the magazine had furnished, and advertisers were deprived of a means of national communication to help sell their products and services.

Defendants would no doubt argue that their conspiracy was intrastate and aimed only at the intrastate part of plaintiff's business, so that the effect on the national magazine was indirect and inconsequential for purposes of determining Sherman Act jurisdiction. But the Supreme Court has squarely rejected this contention on more than one occasion. In *United States* v. *Women's Sportswear Mfrs. Ass'n,* 336 U.S. 460 (1949), the lower court dismissed the case because the defendants were not themselves in interstate commerce and the alleged restraint was directed at their own operations. The Supreme Court reversed, stating:

> "Restraints to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." 336 U.S. at 464.

In *St. Bernard General Hospital, Inc.* v. *Hospital Service Ass'n of New Orleans, Inc.*, 510 F.2d 1121 (5th Cir. 1975), the court, quoting from an earlier opinion, criticized the suggestion in the lower court's decision that the question of intrastate intent was relevant to the issue of substantial effect:

> "The focus of the Act is to protect interstate trade from interferences of all degrees of subtlety.

> The concept of interstate commerce is a practical one. The interstate nerves of a local business can be deadened swiftly by a conspiracy the object of which happens to be the intrastate aspect of a plaintiff's business. We see no reason why the federal courts should confine themselves to protecting against interferences with interstate commerce which, quite fortuitously, turn out to have motivated the actions of a defendant. It is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the 'interstate culpability' of those who engage in anti-competitive practices. No matter how intrastate the objects of anti-competitive conspirators, they must take their victims' involvement in interstate commerce as they find them." 510 F.2d at 1124.

In *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia,* 490 F.2d 48 (3rd Cir. 1973), it was observed that the question of the conspirators' intent cannot be used as a factor in a "direct-indirect effect" test. The court in *Doctors* also explained that the reference in such cases as *United States* v. *Frankfort Distilleries, Inc.,* 324 U.S. 293, 297 (1945), which stressed the importance of the purely local aims of a combination, were distinguishable as such cases involved the application of the anti-trust laws to combinations of businessmen or workers in labor disputes and not to interstate commercial transactions.

The recent decision in *Goldfarb* v. *Virginia State Bar, supra,* supports this conclusion. As the lower court in *Goldfarb* pointed out, there was no contention that the Virginia attorneys had conspired for the purpose of restraining the trade of those engaged in the interstate real estate industry. 497 F.2d 1, 15. The purpose of the conspiracy that was attacked in *Goldfarb* was wholly unre-

lated to interstate commerce. Thus the Supreme Court in *Goldfarb* held that a local conspiracy with obviously local intent could nonetheless substantially affect interstate commerce.

It makes no sense to examine plaintiff's business on a piecemeal basis in the present case. The entire business was destroyed by defendants' acts, and the entire impact of those acts on interstate commerce must be examined to reveal the full substantiality of that impact. There can be no question that the demise of plaintiff's corporation, particularly in respect of the interstate advertising of products travelling in the stream of national commerce, had a substantial affect on interstate commerce.

Defendants' reliance upon *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269, 270 (2d Cir. 1964) is misplaced. There, plaintiff's business was wholly intrastate and plaintiff did not even allege any restraint of national activities. The original equipping of the bowling alleys was a one-time event. In this case, the continuous interstate flow of both advertising and news was not contested. These products were passed on to plaintiff's customers and not consumed as incidental supplies.

While *Hospital Building Co.* v. *Trustees of the Rex Hospital*, 511 F.2d 678 (4th Cir. 1975), is now being reviewed by the Supreme Court, it is not good support for defendants in any event. That case did not involve the passing of products to plaintiff's customers, other than a small amount of drugs sold as a part of the service provided by the hospital.

2. *Defendants' conspiracy was "in commerce".*

The alternative test of Sherman Act jurisdiction is whether the conduct complained of occurred within the flow of interstate commerce or acted directly upon the interstate aspects of the plaintiff's business. *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F.2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1954). Defendants recognize that if they "had coerced out-of-state advertisers, concededly their alleged conspiracy would be sufficiently 'in commerce' to sustain federal jurisdiction" (App. Br. 16-17). Having made this necessary concession, however, defendants urge that there was no evidence of such coercion in the record (App. Br. 16). Defendants are mistaken. Not only was there direct, unequivocal evidence of their coercion of interstate advertisers but that evidence was never contradicted, explained or denied in any way.

The testimony of Glenn Moore, New York manager for Pittsburgh-based Rockwell taximeters, demonstrated the pressure put on interstate advertisers by defendant Lefkowitz and other fleet owners (A 379-80):

> "Q. What was the pressure they were exerting on you? You tell me. A. They were saying that they—let me put it this way. They were saying that why was I, not I, but Rockwell, advertising in Taxi Weekly."

Moore's boss, Ralph Ulrich, who was Division Manager of Rockwell's Taximeter Division, testified that Moore passed on this pressure to him "about cutting down your ads in *Taxi Weekly* because the taxi fleet owners wanted [him] to" (A 912).

Although conspiratorial acts are seldom capable of direct proof by an antitrust plaintiff, this case presents as

blatant an example of economic coercion designed to destroy a plaintiff's business as can scarcely be imagined. It is no answer for defendants to cite passages from the early portions of the depositions of these witnesses, who were understandably reluctant to testify against their largest customers, and then ignore the unequivocal admissions which occurred after the witnesses were confronted with the facts and their recollections were refreshed. The real question, which defendants cannot answer, is why defendant Lefkowitz or any other defendant never took the witness stand to deny that he pressured Rockwell to cancel its advertising. Whatever the reason, the undisputed evidence of record established that defendants deliberately focused their conspiracy on plaintiff's out-of-state advertisers, thus forming a sufficient basis to sustain Sherman Act jurisdiction.*

Thus, it is clear that the evidence in this action is amply sufficient to sustain Sherman Act jurisdiction under either of the tests which have been applied by the courts. Defendants' conspiracy directly operated on the interstate aspects of plaintiff's business, and the destruction of that business substantially affected interstate commerce.

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* The circumstances of Chrysler's cancellation of its advertising also demonstrates the direct application of defendants' conspiracy on *Taxi Weekly's* interstate business. In this instance, defendants spread false rumors that *Taxi Weekly* was controlled by Morris Markin of Checker Motors to Chrysler's field representative, Frank Sailler, in New York (A 340, 342). Chrysler's Detroit advertising agency cancelled its advertising because of the false rumor it received from the field (A 763). Again, defendants Naren and Murstein, who were identified by Sailler as the fleet owners who spoke to him (A 340, 345-46), did not come forward to testify at trial.

POINT II

There was sufficient evidence to sustain the jury's finding of an unlawful conspiracy.

Defendants contend, at Point II of their brief, that the lower court should have directed a verdict in their favor on liability. The argument is based upon a factual picture which not only is drawn most favorably to themselves but also is contrary to uncontradicted proof.

The scope of review of the jury's verdict is narrow. The Court is "bound to view the evidence in the light most favorable to [plaintiff] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, Dkt. No. 75-7332 (2d Cir. filed Apr. 21, 1976). Moreover, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.* v. *Union Carbide & Carbon Corp., supra* at 699.

Plaintiff's proof showed that in April 1964, defendant Botwinick, Executive Director of MTBOT, faced with growing pressure to secure passage of a fare increase, demanded that *Taxi Weekly* tailor its contents to report only the news and positions favored by MTBOT (A 107-110). When this pressure was unsuccessful, the fleet owner defendants cancelled their subscriptions to *Taxi Weekly* one after the other during a half-hour period on the day following meetings at the Executive Director's office (A 22-23, 1430-32). Given the further evidence that none of the defendants had previously complained about *Taxi Weekly's* reporting (A 125), that two of the defend-

ants who cancelled had just previously increased their subscriptions (A 126), that three of the defendants admitted discussing their cancellations with others (A 160, 478-80, 453) and that each of the initial cancellees was a high official of MTBOT (A 1453, 1456), it was certainly a fair inference for the jury to find that an agreement was made to cut off subscriptions to *Taxi Weekly*. At this point, the lower court could justifiably have instructed the jury that such an agreement was a group boycott which was unreasonable *per se*. *Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, *supra* (slip op. at 3345).

The lower court, however, ruled that plaintiff must not only prove an agreement to cancel subscriptions but also must show that such an agreement was entered into for the purpose of injuring or destroying plaintiff's business (A 1119). The court instructed the jury that to find such a purpose it would have to find that defendants, pursuant to their agreement, engaged in one or more of the following activities: inducing Weisinger to dissolve plaintiff's business; coercing subscribers to cancel their subscriptions; shutting off the flow of news sources; or shutting off advertising from *Taxi Weekly* (A 1118).

Plaintiff submitted proof on each of these activities. The evidence showed that Botwinick knew in advance of the alleged Weisinger dispute (A 110); that Weisinger, who was enjoying more than $25,000 annual profit from the business while in semi-retirement at the age of 72, inexplicably filed a dissolution proceeding alleging that Peterman was "*persona non grata*" with fleet owners (A 97, 116, 899), an allegation he later admitted was untrue (A 889); and that Murstein admitted knowing that action was being taken to pressure Peterman to sell out (A 159). The evidence showed that long-standing subscribers who were rank-and-file members of MTBOT, suddenly began cancelling their subscriptions immediately

after the leaders of MTBOT had done so (A 1466-68). Uncontradicted proof showed that defendants began withholding news stories from *Taxi Weekly* in the Fall of 1964 (A 184-86). And finally, there was overwhelming proof that defendants had acted, through both coercion and the spreading of false and damaging rumors, to shut off *Taxi Weekly's* advertising. All this, when coupled with the adverse inference which could properly be drawn from defendants' failure to testify, amply supported the jury's verdict (A 1162).

Defendants' argument that there was no impact on competition because *Taxi Weekly* was simply a "house organ" which lost patronage because it had alienated its clientele in early 1964 is demonstrably incorrect both legally and factually. There is no evidence that *Taxi Weekly* was ever a "house organ." The newspaper independently reported all views in the industry, made no change in policy in 1964 (A 116), and had not been reluctant to oppose the fleets' position in the past.* Moreover, there was a very definite effect on competition when subscribers and advertisers were induced to cancel their patronage of *Taxi Weekly* and to take up patronage of defendants' newspaper, the *New York Hackman,* particularly under circumstances where the *Hackman* did not reach the owner-driver audience advertisers were seeking, and subscribers believed *Taxi Weekly* was a better paper. The business of newspaper publishing in this industry was unquestionably restrained by defendants' activities.

The cases involving distributor terminations, such as *Cartrade, Inc.* v. *Ford Dealers Advertising Ass'n,* 446 F.2d 289 (9th Cir. 1971), *cert. denied,* 405 U.S. 997 (1972),

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* In 1953, *Taxi Weekly* had opposed the fleet owners' position on the bill which eliminated the requirement for jumbo-sized cabs (A 280).

have no application here because they did not involve conspiracies to destroy the plaintiff's business. As the *Cartrade* court said:

> ". . . there is no evidence that the defendants, in bringing about the substitution, had, as a primary purpose, putting Cartrade out of business or compelling it to conform to any anticompetitive practices." 446 F.2d at 293.

In the present case, the jury was carefully instructed that they should go beyond the mere cutting off of subscriptions and find purposeful activity designed to injure or destroy plaintiff's business before finding liability (A 1119).

It is also irrelevant that some of the defendants were not direct competitors of plaintiff. Of course, defendants McIntyre, Zeff and Hosynd Publications, who formed the *Hackman* were direct competitors of plaintiff who were supported by advance subscriptions by the remaining defendants and sponsored by MTBOT. But, in any event, even a group boycott motivated by a "purely private quarrel" violates the Sherman Act. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 210 (1959); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1003 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

Since defendant Botwinick has filed a separate brief, it may be appropriate to review the evidence against him separately,* while bearing in mind that once a conspiracy is established, "only evidence which, viewed alone, is of relatively slight import, is needed to connect each con-

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* The evidence against each defendant was separately summarized for the jury (A 1086-94), and the jury's verdict, which exonerated four defendants, reveals that they carefully considered each defendant separately (A 1630-31).

spirator with it." *United States* v. *Pardo-Bolland,* 348 F.2d 316, 325 (2d Cir. 1965); *Morton Salt Co.* v. *United States,* 235 F.2d 573, 580 (10th Cir. 1956), *aff'd,* 360 U.S. 395 (1959).

Much of the evidence against Botwinick has already been detailed herein and need not be repeated. Botwinick concedes that when he called Peterman to his office on April 17, 1964, and demanded that *Taxi Weekly* not publish positions of anyone except the MTBOT (A 110), he was acting as a spokesman for the fleet owners (Botwinick Br. 4). After Peterman refused to acquiesce, Botwinick held another meeting at his office on July 13, 1964, at which he made "various suggestions" and agreed to discuss "further plans" with owner-driver groups the next day (A 1430). It was on that next day that the top officers and directors of MTBOT, of which Botwinick was Executive Director, cancelled their *Taxi Weekly* subscriptions within a half-hour period (A 122-23). At the time, Botwinick's efforts to obtain a fare increase continued to be stalemated (A 1432), and it is a fair inference that his frustration, so evident at the April meeting (A 107-110), had increased.

In addition to the foregoing facts, from which it could be inferred that Botwinick must have known and participated in the agreement of his fellow executives of MTBOT to boycott plaintiff, Botwinick was aware of the dispute between Peterman and Weisinger before it even occurred (A 110). This dispute, of course, was shown to have been contrived when Weisinger admitted that his allegation about Peterman being *persona non grata* with the fleets was untrue (A 899). The evidence linking Botwinick's foreknowledge of the contrived dispute and the dissolution proceeding with an effort to force out Peterman was supplied by defendant Murstein, who admitted to Peterman that he, too, knew that something was

being done to Peterman when the pressure was put on him to sell out (A 158-59).*

Finally, Botwinick refused to give *Taxi Weekly* a statement concerning a remark by Mayor Wagner which indicated that the Mayor favored the unionization drive which MTBOT opposed (A 184). Here, Botwinick claims he was merely exercising his constitutional rights (Botwinick Br. 8), but he fails to mention that Botwinick's withholding of news coincided with similar refusals by two MTBOT attorneys and defendant Schaffran and the termination of invitations to MTBOT meetings (A184-86), all of which suddenly began in the Fall of 1964 (A 184). In this context, it is apparent that Botwinick continued his keen interest in interfering with *Taxi Weekly's* business at every opportunity.

From all of this evidence, viewed as a whole, the jury was entitled to infer not only that Botwinick joined the conspiracy but actually instigated it. This inference was supported and strengthened when Botwinick, despite ample opportunity,** failed to testify. From his failure to describe what happened at the July 13, 1964 meeting, his failure to deny participation in the decision to boycott *Taxi Weekly,* his failure to deny participation in the effort to dissolve Taxi Weekly, Inc. or to explain the circumstances of his prior knowledge of that dispute, and his failure to explain why he withheld news, the jury was entitled to infer that such testimony, if given, would have

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* Botwinick's only response to this damaging testimony is to claim it was stricken (Botwinick Br. 5). It was not. The passage Botwinick refers to as being stricken at A 161 appears at lines 2-9 of A 161. In the testimony cited above, which was two pages earlier at A 158-59, the court clearly indicated that the testimony was proper (A 159, lines 7-9).

** Botwinick was present in the courtroom during the trial (A 38).

been adverse. *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 225-26 (1939). As the Court said in *Interstate Circuit*, "Silence then becomes evidence of the most convincing character." 306 U.S. at 226.

The jury verdict against all appellants, including Botwinick, was amply justified by the evidence.

POINT III

The jury's assessment of damages was properly supported by the evidence.

Recognizing that the jury's assessment of damages was well within the evidence offered by plaintiff through its expert witness, James Kobak, defendants seek to quarrel with Kobak's opinion in three respects, relating to owner's salary, return on capital and multiple of earnings.

Since Taxi Weekly, Inc., a successful business for 33 years, was completely driven out of business by defendants' conspiracy, the method of calculating damages used by Kobak was to assess the value of the business on a going-concern basis immediately before the conspiracy struck in 1964 (A 531). This, of course, is a proper method of determining business-destruction damages, as set forth in many cases emanating from the Supreme Court's statement in *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 16 (1949), that "the Court should consider any evidence which would have been likely to convince a potential purchaser as to the presence and amount of petitioner's going-concern value. . . ." See also, *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1957) *cert. denied*, 356 U.S. 975 (1958); *Taylor* v. *B. Heller & Co.*, 364 F. 2d 608 (6th Cir. 1966); *Simpson* v. *Union Oil Co.*, 411 F. 2d 897 (9th Cir. 1969).

The first step in the process is to determine the proper amount of business earnings to be capitalized. This amount, as noted in *Standard Oil Co. of California* v. *Moore, supra* at 219, is the profit of the business "over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner." Thus, in the case of a sole proprietorship, a partnership, or a Subchapter S small business corporation, where the owners have no need to allocate for tax purposes between salaries, profit and return on investment, adjustments must be made to determine the amount "fairly attributable" to each of these elements. This is the process which Kobak carefully went through.

Defendants first claim that Kobak made no deduction for Peterman's salary (App. Br. 42). Since in the next breath they concede that Kobak did make a deduction of $15,000 as the amount fairly attributable to the labor of the owner, it is apparent that defendants' quarrel is not with Kobak's method of calculation but merely with his opinion as to the amount.* The amount Kobak considered fairly attributable to the owner's labor, $15,000, was based on his own vast experience with hundreds of publishing companies at the time, and it was confirmed by industry statistics showing that the salary range for Peterman's job position in publishing companies comparable to Taxi Weekly, Inc. was at the $15,000 level.

Defendants contend that Kobak should have deducted the "actual salary" of Peterman shown on the company's records. But, as was stated over and over again at trial, the amount shown on the company's records was the en-

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* Thus, the cases cited by defendants (App. Br. 43) holding it improper to deduct *no salary at all* are irrelevant since that did not occur here.

tire amount taken out of the business by Peterman and included both his profits as an owner and payment for his labor. Kobak explained (A 595):

> "In a publication, in a business of this size and this type, I would expect to find a publisher receiving $15,000. In this case Mr. Peterman was also an owner, so part of what he was getting was repayment as an owner rather than as a worker.
>
> "Now, it is all called salary in the financial statements because [of] that Subchapter S that we talked about before."

Deduction of the entire amount taken out of the business by the owners, as defendants suggest, would fail to allocate the amount "fairly attributable" to the owner's labor and would be improper under the cases. Kobak's approach was clearly correct and his opinion as to the amount fairly attributable to owner's labor, backed by the industry statistics, provided sufficient evidence for the jury's verdict.

Defendants next argue that there was no deduction for return on capital, relying on *Vandervelde* v. *Put & Call Brokers & Dealers Ass'n*, 344 F. Supp. 118 (S.D.N.Y. 1972). *Vandervelde*, however, involved the valuation of a brokerage house, in which large amounts of capital were necessary, particularly since the plaintiff took equity positions in many securities. In a publishing business, including Taxi Weekly, Inc. in particular, virtually no capital was necessary, and all parties at trial recognized that return on capital was meaningless in this case (A 596-97). As defense counsel stated, with agreement from Kobak (A 580):

> "Capital assets are of little importance in publishing. Aside from office furniture and machines the magazine publisher doesn't require any capital assets."

Defendants' suggestion that Peterman invested $65,000 in capital (App. Br. 44) is simply mistaken. That amount is the price which Peterman paid Weisinger for stock in Taxi Weekly, Inc. (A 96, 128). None of it was paid to the corporation, and none of it was used to acquire capital assets. In short, Kobak's opinion, as an expert in the financing of publications, that return on capital is a meaningless concept, was supported by the evidence, was not disputed by defendants' expert, and was accepted and emphasized by defendants themselves at trial.

Finally, defendants attack Kobak's opinion of the proper multiple of earnings necessary to arrive at Taxi Weekly, Inc.'s going concern value. First, they claim that his choice of a multiple of ten was arbitrary; then they assert that Kabak failed to take into account their version of the facts. Kobak looked at two groups of publicly-traded securities in the publishing field, which were then valued at 16 and 20 times earnings, solely as a starting point. This was certainly proper based on Kobak's own experience that the selling price of any publishing company will bear some relationship to the value placed on publishing stocks by public investors (A 526). Kobak, however, carefully analyzed all factors distinguishing Taxi Weekly, Inc. from other companies, particularly its size (A 530, 550), in arriving at a multiple considerably lower than the industry average. To suggest that Kobak's opinion of the proper multiple is arbitrary is simply incorrect. Such questions of judgment are particularly appropriate for expert opinion, and, after plaintiff's expert gave his opinion and the reasons for it, defendants were

perfectly free to do the same. The validity of those opinions was for the jury to decide.

Defendants' assertion that Kobak failed to consider "Peterman's alienation of the clientele he depended on" (App. Br. 49) simply assumes defendants' version of the facts. The real question is whether the verdict was excessive because expert testimony was based on untrue or disproven assumptions of fact. This question was dealt with in *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir. 1974). In *Terrell*, appellants attacked the expert testimony of appellee's witness, Bowles, claiming that it violated the strictures that although damages may be determined approximately and indirectly, including estimates based on assumptions, such assumptions must rest on adequate bases. After noting that the plaintiff's burden of establishing the amount of damages is less severe than his burden of proving the fact of damage, the court cited *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) for the rule that in such circumstances juries are allowed to act on probable and inferential as well as upon direct and positive proof. 494 F.2d at 24. The court then went on to say:

> "Appellant has made a spirited attack on Bowles' testimony, and we have read the arguments with great care. Nevertheless, our reading of appellee's responses and our study of the record convinces us that the Bureau has not identified 'facts upon which Bowles based his testimony [that] have been proved by undisputed evidence to be untrue.' Brief for Appellant at 35. Rather, appellant has demonstrated that Bowles rested his estimates in part on facts that, though in dispute, could from the evidence be found in favor of Terrell and would support the assumptions on which Bowles' opinion evidence was based. See Autowest, Inc. v. Peugeot,

> Inc., 2 Cir. 1970, 434 F.2d 556, 566." 494 F.2d 16, at 24.

That comment applies with equal weight to the present case. Here, plaintiff's expert based his opinion on the assumption that plaintiff's business was healthy and not subject to any dispute or condition significant enough to affect its value in the Spring of 1964 immediately before the conspiracy struck. While defendants disputed this assumption and claimed that there were disputes and unhealthy conditions at the time, the affirmative evidence offered by plaintiff, coupled with defendants' failure to testify in support of their position, clearly provided the jury with facts to support the assumptions on which Kobak's opinion was based. Certainly, on the present record, it would be impossible to conclude that the facts on which Kobak based his testimony "have been proved by undisputed evidence to be untrue."

Professor Moore discusses fully the standard for determining a motion for a new trial on the ground of verdict against the weight of the evidence, and his words have been cited in many cases in this Circuit:

> "The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not."

6A Moore, Federal Practice 59-160, 59-161 (2d ed. 1974). See also *Compton* v. *Luckenbach Overseas Corp.*, 425 F.

2d 1130, 1133 (2d Cir. 1970); *Creagh* v. *United Fruit Co.*, 178 F. Supp. 301 (S.D.N.Y. 1959).

When this standard is applied to the present case, and the evidence is viewed in the light most favorable to plaintiff, it is readily apparent that there was substantial evidence to support the jury's verdict.

CONCLUSION

The appeal of appellants other than Botwinick should be dismissed. Whether or not that relief is granted, the judgment below should be affirmed in all respects.

Respectfully submitted,

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Appeto